209888

January 19, 2004

VIA UPS OVERNIGHT DELIVERY

ENTERED
Office of Proceedings
JAN 2004
Part of
Public Record

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: AB-33 (Sub-No. 132X) - Union Pacific Railroad Company - Abandonment Exemption - In Rio Grande and Mineral Counties, Colorado -- Reply to City of Creede's Petition to Reopen

Dear Mr. Williams:

I am enclosing the following material for filing in the above proceeding:

1. An original and ten (10) copies of Union Pacific Railroad Company's Reply to City of Creede's Petition to Reopen.

2. A diskette containing the foregoing document in Microsoft Word 97 format.

Please indicate receipt of the enclosed materials by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Very truly yours,

Robert T. Opal
General Commerce Counsel
Direct dial: 402/ 271-3072
Fax: 402/ 271-5610

cc: Per Service List

JAN 20 2004
RECEIVED

Law Department

UNION PACIFIC RAILROAD
1416 Dodge Street, Rm. 830, Omaha, NE 68179-0001
fx. (402) 271-5610

209888

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-33 (SUB-NO. 132X)

UNION PACIFIC RAILROAD COMPANY
– ABANDONMENT EXEMPTION –
IN RIO GRANDE AND MINERAL COUNTIES, CO

REPLY TO CITY OF CREEDE'S PETITION TO REOPEN

UNION PACIFIC RAILROAD
COMPANY

Robert T. Opal
General Commerce Counsel
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Omaha, Nebraska 68179
(402) 271-3072
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Dated: January 19, 2004
Filed : January 20, 2004

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UNION PACIFIC RAILROAD COMPANY
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IN RIO GRANDE AND MINERAL COUNTIES, CO

REPLY TO CITY OF CREEDE'S
PETITION TO REOPEN

This Reply is filed on behalf of Union Pacific Railroad Company ("UP"). It is in response to multiple filings made by the City of Creede ("City") beginning with the City's "Submission of Materials Compiled During U.S. District Court Proceedings" filed October 14, 2003, which the Board treated as a Petition to Reopen in its decision served November 3, 2003.

The City is requesting the Board to unwind a line sale which UP made to the Denver & Rio Grande Railway Historical Foundation ("Foundation") over 3½ years ago under the Board's "Offer of Financial Assistance" ("OFA") procedures. The City contends that this relief (which it describes as a revocation of the Foundation's "OFA rights") is justified because of alleged deficiencies in the Foundation's April 2, 1999 offer, and because of the Foundation's alleged conduct since the sale was closed. As we will show below, the sale cannot be unwound at this late date by "revocation" of the Foundation's "OFA rights". An

"adverse abandonment" would be required to terminate the Foundation's rights, relief which the City has not even sought. Further, the evidence the City has submitted, while voluminous, does not warrant any action by the Board other than denial of the City's Petition.

I.

BACKGROUND

A. The Abandonment and the OFA Sale

This proceeding involves a 21.6 mile rail line known as the Creede Line extending from milepost 299.3 near Derrick to the end of the line at milepost 320.9 at Creede, Colorado formerly owned by the Denver & Rio Grande Western Railroad Company ("D&RGW"), a UP predecessor. UP originally sought to abandon the branch by notice of exemption, which the Board served on January 25, 1999. Two entities then filed competing offers of financial assistance to purchase the entire line; the Foundation and the Rio Grande & San Juan Railroad Company ("RG&SJ"). The Board found both entities to be financially responsible and, in accordance with the Board's OFA rules, UP selected the Foundation as the offeror with which it wished to negotiate. The negotiations resulted in an agreement and, by decision served May 11, 1999, the Board approved the sale to the Foundation and dismissed the abandonment, effective on the date the sale was consummated.

The City had not, to this point, actively participated in the proceeding. However, on November 26, 1999, more than six months after the Board's decision approving the OFA sale, the City requested the Board to reopen the

decision arguing, among other things, that the Foundation was not "financially responsible". The Board denied the City's petition in Docket No. AB-33 (Sub-No. 132X), Union Pacific R. Co. - Abandonment Exemption, served May 24, 2000. The sale was consummated on the same date.[1]

In November, 2000 the City filed a civil lawsuit against the Foundation, obstensively to apply the City's zoning laws to portions of the line's right-of-way. However, the materials from this case attached to the City's October 14 Submission make it clear that the City's real purpose in bringing this litigation was to oust the Foundation from the line.

B. The City's Request to Reopen

The City is requesting that the Board "reopen the abandonment proceeding and revoke the OFA rights obtained by the Foundation" (City Submission, p. 3).[2] In other words, the City wants the Board to order the Foundation and UP to "unwind" the May 24, 2000 OFA sale - over 3½ years after it was consummated - by requiring the Foundation to reconvey the line to UP, and requiring UP to accept it. This would leave UP with a rail line it does not

[1] The consummation occurred over a year after the Board's approval of the sale. A major reason for this delay was a dispute with the Colorado State Board of Land Commissioners (Land Board), which claimed that a portion of the right-of-way near Creede (Section 36) had reverted to the state. After months of negotiations, the Land Board signed a settlement agreement with UP on May 23, 2000, which permitted the sale to proceed.

[2] The Board's decision served November 3, 2003 (at p. 2) states that the City is also requesting that UP's abandonment exemption be revoked. There is, however, no such request in the City's submissions.

want and which is isolated by more than 100 miles from the rest of UP's rail system.[3]

This City's justification for this extraordinary relief is that it has supposedly discovered "new evidence" showing that Foundation's OFA rights were "fraudulently obtained". The City's principal contention is that the "new evidence" shows that the Foundation really wasn't "financially responsible" when it submitted its OFA over four years ago (in spite of the fact that the sale closed). The City also contends that the Foundation's post sale conduct shows that the Foundation did not acquire the line to operate rail service, but did so in order to lease real estate.

II.

ARGUMENT

The City's Petition should be denied. As we will show below, the relief the City is seeking is not even available in this proceeding. Further, the City's "new evidence" - which is not really "new" at all - is irrelevant at this late date and does not show what the City claims to show.[4]

[3] The former UP trackage from milepost 180.0 near Walsenburg to milepost 299.3 near Derrick (the east end of the Creede Branch) was sold in 2003 to the San Luis & Rio Grande Railroad, a new short line railroad, see Finance Docket No. 34350, San Luis & Rio Grande R. Co. – Acquisition and Operation Exemption – Union Pacific R. Co. (not printed) served July 18. 2003.

[4] A review of the 400+ pages of "new evidence" the City filed with its October 14, 2003 submission will reveal that practically all of this "new evidence" was obtained in mid-2001 - over two years ago - during the discovery phase of a court proceeding between the City and the Foundation. The City offers no reason for its lengthy delay in bringing this "new evidence" to the Board's attention.

A. The Foundation's Rights to Own and Operate the Creede Line Cannot be "Revoked"

There is a fatal problem with the City's submissions. The City cannot obtain the relief it is seeking in this proceeding. The City is trying to terminate the Foundation's rights to own and operate the Creede Branch. But "revocation" of the Foundation's "OFA rights" would not accomplish that. The Board considered a virtually identical issue in Finance Docket No. 34014, Canadian National R. Co -- Trackage Rights Exemption – Bangor and Aroostock R. Co. served June 25, 2002,. In that case, the bankruptcy trustee of the BAR sought to terminate CN trackage rights over BAR (which CN had not yet used) by obtaining a "revocation" of the regulatory exemption which had authorized the rights. The Board held that a "revocation" would not terminate CN's trackage rights because the rights, once authorized, could not be terminated over CN's opposition without an adverse discontinuance proceeding.

The same principle applies here. The Foundation's OFA purchase was authorized by the Board and the purchase was consummated on May 24, 2000. As a result, regardless of whether the Foundation has actually operated the line, it has been the incumbent railroad for over 3½ years. If the City wants Board action removing the Foundation from the line, it must file a formal application for adverse abandonment, see Canadian National, supra, pp. 8-10; Finance Docket No. 34090, Union Pacific R. Co. – Declaratory Order, served November 9, 2001.

B. The Foundation's "Financial Responsibility" in 1999 is Irrelevant at This Late Date and, in any Event, the Foundation had Sufficient Financial Responsibility to Close the OFA Sale.

The City's principal contention is that, when the Foundation filed its OFA over four years ago, it was really not "financially responsible." The City's submissions then go on for pages discussing assets listed in the Foundation's April 2, 1999 OFA filing which the Foundation may not have had at the time, or may have subsequently lost access to.

Whatever relevance any of this may have had in April, 1999, it has absolutely no relevance now:

First - The City is missing the forest for the trees. This OFA sale closed. That's the ultimate test of the Foundation's "financial responsibility." Not only did the sale close, but the Foundation was able to pay UP $350,000 in cash, which was very close to the purchase price of $387,930 which the Foundation had offered and claimed it could fund in its April 2, 1999 OFA (p. 1). The final purchase price of $624,616 was, of course, substantially higher than what the Foundation had proposed, and UP agreed to take a note for a portion of the price ($274,616). Nevertheless, the Foundation was able to come up with nearly the entire amount of cash it had offered UP in its OFA. Obviously, the Foundation was not nearly as devoid of assets as the City would now have the Board believe.

Second - The purpose of the "financial responsibility" requirement is to protect an abandoning carrier (here UP) from unnecessary delays in abandonment consummation. As the Board explained in Docket No. AB-573X,

Trinidad R. Co. - Abandonment Exemption - In Las Animas County, CO, served April 17, 2002:

> "The initial determination of financial responsibility, made for the limited purpose of postponing the abandonment to give the offeror an opportunity to acquire the line, is necessarily based on a preliminary record. This initial determination of an offeror's financial responsibility operates to protect abandoning railroads from suffering delays in consummating abandonment caused by OFAs filed by persons who are manifestly unable to acquire and operate the line."

Based on the above discussion, the Board in Trinidad denied a request by the line owner to reconsider a prior finding that the offeror was financially responsible. The reason for the denial is directly relevant to the Creede case. The Board denied the request because the delays in consummation which the financial responsibility requirement was designed to prevent had already occurred. All that remained was for the offeror to close the sale, if it could (Trinidad, p. 3).[5]

The facts in this case are much stronger than those in Trinidad. In this case, UP - the abandoning carrier the "financial responsibility" requirement was designed to protect - is not seeking reconsideration of this issue. To the contrary, UP opposes reconsideration. And, like Trinidad, the delays which the "financial responsibility" requirement was designed to prevent have already occurred. Unlike Trinidad (where there were still delays to come while the offeror tried unsuccessfully to close), any "delays" in this case ended over 3½ years ago, when the OFA sale closed. Finally, the relief the City is seeking - the reversal of the OFA sale over 3½ years after it closed - is effectively the same as

[5] The offeror in Trinidad was ultimately unable to close.

imposing a 3½ year delay in the abandonment on UP. That's exactly what the "financially responsibility" requirement was designed to avoid.

C. The City's "New Evidence" does not Support the City's Claims as to the Foundation's Post Sale Activities.

The City argues that the Foundation's "OFA rights" should be revoked (and that UP should be required to take the line back) because of some of the Foundation's alleged post sale activities, specifically certain leasing activities in Creede, and the fact that the Foundation has not yet restored the line to service. Preliminarily, these issues have nothing to do with the question of whether the Foundation's "OFA rights" were properly obtained. They concern events that occurred after the OFA sale. Moreover, the City in this proceeding is seeking relief against both the Foundation (by requiring it to reconvey the line to UP) and UP (by requiring it to take the line back). Whatever the Foundation may have done or may not have done after the sale cannot possibly justify any relief against UP.

UP has had no presence in the Creede area for over 3½ years. It has had no involvement in the activities the City is complaining about, and has no direct knowledge of these activities. However, the information the City has filed with the Board does not support the City's heated rhetoric.

1. **Leasing Activities**

The City claims that the Foundation's "real agenda" in acquiring the line is "leasing real estate," and that the Foundation was demanding lease revenues from businesses and residences which "had been undisturbed for over a century." (City October 14 submission, pp. 24-25). The City particularly focuses on a lease the Foundation apparently sought from an individual named Louise Gray, contending that the proposed lease terms were "extortionate", and another proposed lease to a "Mr. and Mrs. Pizel" (Id., p. 26).

UP, of course, knows nothing about the Foundation's lease proposals or its negotiations with Ms. Gray, the Pizels, or anyone else. But we do know something about the property situation in Creede prior to the OFA sale, and it was rather different than the impression the City is now trying to create.

As part of the OFA sale, UP assigned to the Foundation a number of long-standing leases which UP's predecessors had made with individuals and businesses in Creede, typically the owners of adjoining properties. A copy of the Assignment and Assumption Agreement showing the assigned leases ("Exhibit B" to this agreement) is attached to this Reply as Appendix 1.[6] As can be seen from Appendix 1, the assigned leases included leases to "L. E. Gray" and "Dale E. Pizel", presumably the same two individuals named at p. 26 of the City's October 14 Submission. Pertinent extracts from assigned Gray and Pizel leases are attached as Appendices 2 and 3, respectively. As can be seen, the

[6] Shortly after the closing of the OFA sale, the Colorado Land Board demanded that several leases in a portion of Creede designated "Section 36" be terminated, on the grounds that the state right of way grant in this section did not permit the railroad to make such leases. Our understanding is that the Foundation complied with this demand.

Gray lease was made in 1971 and, according to the lease, replaced an earlier lease made in 1955. The Pizel lease was made in 1993 and, according to the lease, replaced an earlier lease made in 1978. There could have been leases predating the 1955 and 1978 leases, but this cannot be readily determined from surviving D&RGW records.

All that the City's evidence shows is that, sometime after the OFA sale, the Foundation made an effort to renegotiate some of the assigned leases. There is nothing unusual about that. As shown above, both the Gray and Pizel leases had been renegotiated at least once before. Had UP retained ownership of the line, it too would have eventually sought renegotiation of the pre-existing leases, particularly the older ones.

The City's contention that the Foundation was demanding "extortionate" leases is simply rhetoric. The example used by the City is the Gray lease where, according to the City, the Foundation requested rental of $300 per year and "complex insurance coverages of as much as $1 million." (City October 14 Submission, p. 26). But why is this "extortionate?" As can be seen from Appendix 2, the 1971 Gray lease provided an annual rental of $50 per year. If indexed to present value using the CPI, the equivalent rental today would be approximately $228 per year.[7] The $72 per year difference between the latter amount and the $300 annual rental which, according to the City, the Foundation was requesting (which works out to $6 per month) is insignificant. As to insurance coverage, the coverage required in the new Gray lease the City is

[7] Consumer Price Index - All Urban Consumers - U.S. City Average - All items less food and energy (1982-84 = 100).

complaining about (City October 14 Submission, pp. 83-84) is virtually identical to the coverage required by Exhibit B to the 1993 Pizel lease as shown in Appendix 3. In other words, the Foundation's predecessors in interest have been requiring this type of insurance coverage for leases on the Creede line for at least ten years. And UP itself, in its modern real estate leases, normally requires insurance coverage at least as extensive as the coverage required in these leases. This is not an arbitrary requirement. It is the coverage we believe necessary to adequately protect the railroad against liability that may arise from a lessee's presence and activities on railroad property.

2. Line Restoration

Unlike most lines involved in OFA transactions, the Creede line was not operational at the time of the May 24, 2000 OFA sale. The City, which obviously does not want the Foundation to restore service on the line, nevertheless complains that the Foundation has not yet been able to restore service, and questions the Foundation's ability to do so. This, according to the City, supposedly shows that the Foundation never had any intent to restore service on the line (City October 14 Submission, p. 2).

As with the alleged leasing activities, UP has no direct knowledge of the Foundation's rail restoration efforts. However, the City's own evidence refutes the notion that the Foundation has had no intent to restore rail service. The City itself points to the Foundation's efforts to raise funds to finance rehabilitation of the line (City October 14 Submission, p. 21). While the City speaks disparagingly of these efforts, the fact remains that these efforts show that the

Foundation is genuinely pursuing restoration of service. The fact that it has not yet been successful is raising the necessary funds does not mean that the OFA was "fraudulently" obtained.

Moreover, the City's own evidence shows why the Foundation may not have been able to raise the necessary funds. In the deposition testimony attached to the City's October 14 filing, Donald Shank, the Foundation's President, repeatedly testified that the City's lawsuit against the Foundation and related actions by some City officials were driving potential investors and donors away (see, for example, City October 14 Submission, pp. 218, 220, 233, 246). At one point, Mr. Shank described how the Foundation lost three investors who would have invested $4 - $4.5 million in the project (Id., p. 218). While UP has no direct knowledge of the Foundation's fundraising efforts, Mr. Shank's testimony is a plausible explanation of why the Foundation has been unable to raise the necessary funds. And it is particularly telling that, even though this testimony is contained in the City's own submission, the City completely ignores it in the pleadings it has filed to date.

D. Other Matters

As previously discussed, when the OFA sale closed, UP took a note from the Foundation for a portion of the purchase price ($274,616). In a bizarre pleading filed December 1, 2003, the City objects to UP's extending the due date on this note to 2005. According to the City, this extension gives the Foundation the ability to "speculate in the right of way as a real estate opportunity",

apparently because the note will not be fully paid until a date more than 5 years from the award of OFA rights (City December 1, 2003 Submission, p. 4).

This contention requires little discussion. There is nothing in the statute, the Board's rules or decisions that prevents a selling railroad from voluntarily agreeing to finance part of the purchase price in an OFA sale, as UP did here, see Docket No. AB-33 (Sub-No. 132X), Union Pacific R. Co. - Abandonment Exemption, supra, served May 24, 2000, p. 4. There is no limit to the amount of time the selling railroad can agree to finance the sale - it is a matter of negotiation and agreement between the seller and the buyer. Had UP and the Foundation agreed in the original OFA agreement that UP would take a note for a portion of the purchase price due in 2005 - or, for that matter, due in 2010 - that would not have been grounds for the Board to reject the agreement. Indeed, under the Board's rules, once an abandoning carrier and an offeror enter into a voluntary OFA purchase agreement, whatever it may be, the Board "will approve the transaction and dismiss the application for abandonment or discontinuance, or the petition for exemption or notice of exemption." 49 C.F.R. § 1152.27(f)(2). The fact that the current 2005 due date on the Foundation note results from extensions granted by UP rather than from the original OFA agreement is a distinction without a difference.

III.

CONCLUSION

For the reasons discussed above, UP respectfully requests that the City's Petition be denied.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

Robert T. Opal
General Commerce Counsel
1416 Dodge Street, Room 830
Omaha, Nebraska 68179
(402) 271-3072
(402) 271-5610 (FAX)

VERIFICATION

Gary B. Collins declares under penalty of perjury that he is Director Real Estate – North for the Union Pacific Railroad Company, that he has read the foregoing Reply, and that the factual statements in Part C(1) of the Reply as to real estate and leasing matters are true and correct to the best of his knowledge, belief and information.

Dated: January 19, 2004

Gary B. Collins

Gary B. Collins

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document upon the persons shown below. Service was made by UPS Overnight (except as shown) with delivery charges prepaid.

George M. Allen, Esq.
206-A Society Drive
Telluride CO 81435

Raymond P. Micklewright, Esq.
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Hon, B. J. Meyers
Mayor, City of Creede
P.O. Box 457
Creede CO 81130
(via First Class Mail)

Dated at Omaha, Nebraska this 19th day of January, 2004.

Robert T. Opal

APPENDIX 1

ASSIGNMENT AND ASSUMPTION AGREEMENT
BETWEEN UP AND FOUNDATION,
MAY 24, 2000
(EXTRACTS)

DUPLICATE ORIGINAL
ASSIGNOR COUNTERPART

ASSIGNMENT AND ASSUMPTION AGREEMENT

FOR VALUE RECEIVED, UNION PACIFIC RAILROAD COMPANY, a Delaware corporation ("Assignor"), acting by and through its duly authorized officers, has ASSIGNED AND TRANSFERRED, and by these presents does ASSIGN AND TRANSFER unto DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION, a tax exempt, not-for-profit Colorado corporation ("Assignee"), all of Assignor's right, title and interest in and to the tenant leases (the "Leases") now or hereafter affecting the real property (the "Property") described on **Exhibit A**, which Leases, and all amendments thereto, are described on **Exhibit B**, together with all security deposits and other deposits held by Assignor under the terms of said Leases.

TO HAVE AND TO HOLD the Leases unto Assignee, its successors and assigns. This Assignment is made and accepted without recourse against Assignor as to the performance by any party under such Leases.

Assignee agrees to (a) perform all of the obligations of Assignor pursuant to the Leases accruing after the date hereof, and (b) indemnify and hold Assignor harmless from and against any and all claims, causes of actions and expenses (including reasonable attorney's fees) incurred by Assignor and arising out of (1) Assignee's failure to comply with terms of the Leases after the date hereof, and (2) claims under the Leases by the tenants named in the Leases accruing after the date hereof.

All exhibits attached to this Agreement are incorporated herein for all purposes.

This Assignment and Assumption of Leases shall inure to and be binding upon the parties, their successors and assigns.

Dated the 24 day of May, 2000.

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation

By: _____
Title: Assistant Vice President

DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION, a tax exempt,
not-for-profit Colorado corporation

By: _____
Title: PRESIDENT

APPROVED AS TO FORM

GENERAL CONTRACT COUNSEL
05/09/00
G:\LAWADM\BMH\DEEDS\DR&GHistorical.assignment.doc

EXHIBIT "B"

CONTRACTS & REAL ESTATE DEPARTMENT
AGREEMENTS FOR THE SALE OF THE CREEDE BRANCH
FROM MP 299.3 NEAR DERRICK, CO TO MP 320.9 AT CREEDE, CO
TO THE DENVER & RIO GRANDE RAILWAY HISTORICAL FOUNDATION
DATE: AUGUST 11, 1999 FILE: 1727-05

AUDIT NO.	LOCATION	TYPE	PARTY	MP	FOLDER
202060	WAGON WHEEL GAP, CO	LEASE	PEEDE, BUTCH	311.00	1579-16
11057	CREEDE, CO	LEASE	MINERAL COUNTY COMMISSIONERS	320.25	1460-26
S014860	CREEDE, CO	LEASE	MINERAL COUNTY COMMISSIONERS	320.70	1457-83
S015960	CREEDE, CO	LEASE	GRAY, L.E.	320.85	1460-30
S016836	CREEDE, CO	LEASE	MYERS, M.V.	320.81	1460-31
S016851	CREEDE, CO	LEASE	CREEDE, CITY OF	320.61	1460-29
S017565	CREEDE, CO	LEASE	TOMKINS HARDWARE COMPANY, INC.	320.74	1457-84
S017665	MASONIC PARK, CO	LEASE	SAN LOUIS VALLEY MASONIC ASSOC	302.59	1459-64
S018458	CREEDE, CO	LEASE	CREEDE, CITY OF	320.75	1460-27
S709186	CREEDE, CO	LEASE	BASKEY GALLERY	320.77	1460-25
S711943	CREEDE, CO	LEASE	PIZEL, DALE E.	320.75	1460-32
S717162	SOUTH FORK, CO	WIRE	U S WEST COMMUNICATIONS	302.39	1563-25

APPENDIX 2

LEASE BETWEEN D&RGW AND LOUISE E. GRAY, MARCH 4, 1971 (EXTRACTS)

Form 2525
Section 1
Rev. 2/69

LEASE

LEASE NO. 15960

THIS LEASE, Made and entered into this 4th day of March 19 71, between THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware corporation, hereinafter called "Lessor," and LOUISE E. GRAY, an individual, Mailing Address: Creede, Colorado 81130 hereinafter called "Lessee," WITNESSETH, That:

Section 1. Lessor, in consideration of the rents to be paid and the agreements to be performed by Lessee, hereby leases to Lessee premises situate in the County of Mineral and State of Colorado to-wit:

(a). Description–

The westerly 80 feet of Lessor's right of way at Creede, Colorado, from a line at right angles to Lessor's Creede Branch Main Track, opposite Milepost 32+4486 ft. northerly 35 ft, as shown on attached map No. 13918, containing 2800 square feet.

(b). Term–To have and to hold said above described property from December 1, 1970 until such time as this agreement shall be terminated as hereinafter provided.

Section 2. Rental–Lessee agrees to pay to Lessor a rental of FIFTY AND NO/100 ---------- ----------DOLLARS ($ *50.00*) per annum , payable annually in advance.

Section 3. Purpose–Lessee agrees to use said premises for the following purpose and for no other, to-wit:

Garage site, parking area and access area.

Section 4. Improvements–Lessee shall maintain all improvements whatsoever which on the date hereof exist upon the leased premises and it is agreed that Lessee may construct improvements upon the leased premises consistent with the purposes of this lease, provided always, however, that the style and type of construction shall be subject to approval by Lessor. All improvements on the leased premises including those which on the date hereof exist upon said premises and those hereafter constructed on said premises shall, during the continuance of this lease, be maintained and painted by the Lessee to the satisfaction of the Lessor, and at all times be kept by the Lessee in a state of good repair. All improvements heretofor or hereafter constructed upon the leased premises shall be deemed to be attached to the land and to be the property of the Lessor, subject to the condition hereinafter stated; provided, however, that if at the termination hereof Lessee shall have fully paid the rent herein reserved and shall in all other respect have faithfully kept, observed and performed the agreements hereof, then such improvements on said leased premises as may have been purchased by Lessee or erected or placed upon the leased premises by the Lessee shall upon such termination become the property of the Lessee and said Lessee may, or at the request of Lessor, shall, within thirty (30) days after termination of this lease, remove at Lessee's sole expense such improvements on said leased premises as may have been purchased by Lessee or erected or placed upon said premises by said Lessee and restore said premises to substantially their former state in accordance with the provisions of Section 21 hereof, but if Lessee shall be in default upon the termination of this lease, then such improvements on said leased premises as may have been purchased by Lessee or erected or placed upon said premises by Lessee, shall remain the exclusive property of the Lessor; provided further, however, that if at the termination hereof Lessee is in default in any of the agreements herein contained and Lessor shall nevertheless desire Lessee to remove such improvements on the leased premises as may have been purchased by Lessee or erected or placed on said premises by Lessee, and shall so notify Lessee, then all such improvements shall upon such termination become the property of Lessee and Lessee shall remove the same from the leased premises and restore said premises to substantially their former state in accordance with the provisions of Section 21 hereof.

Section 5. Charges and Taxes–Lessee shall pay all charges for electricity, gas and water used by Lessee on said premises. Lessee also agrees to pay, or cause to be paid, before the same shall become delinquent, all taxes and assessments of every nature that may be levied or assessed upon any buildings or improvements erected or placed on said premises by the Lessee. In the event the taxing authorities shall fail or refuse to assess such buildings and improvements in the name of the Lessee, or shall render tax statements for the land and the buildings and improvements in the name of the Lessor, then the Lessor shall pay the said taxes and assessments before the same become delinquent, and the Lessee agrees to reimburse the Lessor for the full amount of such taxes and assessments levied and paid with respect to such buildings and improvements within thirty days after receipt of bill therefor.

Section 6. Fire Insurance–During the continuance of this lease Lessee will cause any policies of fire insurance on the fixtures, structures and improvements upon said demised premises and the contents thereof to be so written that in the event of the loss thereof or damage thereto by fire, no insurance company shall be subrogated to the right of the Lessee or shall have recourse against Lessor for such loss or damage.

Section 7. Care of Premises– Lessee agrees at all times to keep said premises in a safe, clean and sanitary condition and free and clear of all debris and inflammable material which might tend to increase the risk of fire or give the premises an untidy appearance.

Section 8. Advertising– It is understood and agreed that no building, structure or other improvement upon the leased premises shall be used for displaying circus posters or any signs or advertisements other than such notices and signs as may be connected with the business of the Lessee, and that such signs and notices shall be neat and shall be properly maintained.

Section 9. Damage to Improvements–In the event any building or other improvements upon said leased premises purchased by the Lessee or constructed or erected by the Lessee on the leased premises is damaged or destroyed by fire, storm or other casualty the Lessee shall within thirty (30) days after such happening remove all debris and rubbish therefrom and if Lessee fails so to do, Lessor may enter the leased premises and remove such debris and rubbish and the Lessee agrees to reimburse the Lessor within thirty (30) days after bill rendered for the expense so incurred.

Section 10. Liens–The Lessee shall pay for all materials joined or affixed to the leased premises and shall pay in full all persons who perform labor upon said leased premises and shall not permit or suffer any mechanic's or material man's lien of any kind or nature to be enforced against the leased premises for any work done or materials furnished thereon at the instance or request or on behalf of the Lessee, and the Lessee agrees to indemnify and hold harmless the Lessor from and against any and all liens, claims, demands, costs, court costs, attorney fees and expenses of whatsoever nature, in any way connected with or growing out of such work done, labor performed, or materials furnished.

Section 11. Laws and Regulations– Lessee agrees, without cost to Lessor, to comply with all laws, rules, regulations and ordinances affecting said premises.

Section 12. Clearances– Lessee covenants and agrees not to pile or permit any material whatsoever, or erect, or permit to be erected, any structure, appliance or obstacle nearer than six (6) feet to the nearest rail in any track, except by and with the written consent of the Lessor, except that Lessee may operate, at Lessee's sole risk, loading and unloading devises extending into cars adjacent to said premises, provided that said devises, when not in use, shall be removed from the cars to a location not nearer than six (6) feet to the nearest rail in any track. Notwithstanding the provisions of Section 17 hereof, Lessee shall and will at all times indemnify and save harmless the Lessor, of, from and against any and all damages, remote as well as proximate, in anywise resulting from any non-performance or non-observance of the covenant and agreement herein contained, for which the Lessor shall become, in whole or in part, liable to be charged, and neither the Lessor's knowledge or notice of any such non-performance and non-observance, nor its failure to notify its own employees thereof, nor its continued operation of any said track, shall be in anywise deemed a waiver of the foregoing covenant of indemnity or to relieve the Lessee therefrom.

Section 13. Inflammables– Except by and with the written consent of the Lessor, the premises shall not be used for loading, unloading or storage of explosive, dangerous or inflammable substances, oil, gasoline, volatile liquids, chlorine, or liquefied petroleum gas, and, when with the written consent of the Lessor, either under Section 3 hereof or otherwise, the premises are so used, Lessee agrees to comply with all regulations and specifications prescribed in Association of American Railroad circulars respecting same.

Section 14. Artificial Lighting– Artificial Lighting in pump houses, warehouses, or other enclosures where oil or other inflammable fluid supplies are handled or stored, except when in unbroken original containers, shall be by electricity, and all electrical installations on such premises shall conform to and be maintained in accordance with the "National Electrical Code," Article 32, and in accordance with the recommendations for such locations as are embodied in the National Electrical Safety Code, and also in accordance with requirements of any local ordinance or state or federal laws which may be in effect during the term of this lease.

Section 15. **Right of Inspection**- The said premises shall be open at all reasonable times for inspection by the Lessor's authorized representatives.

Section 16. **Liability for Breach**- The Lessee shall be liable for any and all injury or damage to persons or property of whatsoever nature or kind arising out of or contributed to by any breach, in whole or in part, of any covenant of this agreement by the Lessee.

Section 17. **Indemnity**- It is agreed as one of the material considerations for this lease and without which the same would not be granted by the Lessor, that the Lessee assumes all responsibility for and agrees to hold harmless and indemnify the Lessor from and against all damage to property of the Lessee or to any other property on said leased premises, regardless of Lessor's negligence, arising from fire howsoever caused.

The Lessee also shall indemnify and hold harmless the Lessor from and against any and all liability, loss, damage, claims, demands, actions, causes of action, costs and expense of whatsoever nature growing out of injury to or death of persons whomsoever including without limiting the generality of the foregoing, the officers, agents, servants and employees of the parties hereto, or the loss or destruction of or damage to property whatsoever of persons whomsoever, including the parties hereto, and their employees, when such injury, death, loss, destruction or damage occurs on the leased premises or results from or arises in any way in connection with, or incident to the occupation or use including ingress and egress of the leased premises by, or the presence thereon of, the Lessee, the Lessee's officers, agents, servants, employees, patrons, licensees, or invitees, except when caused solely by the negligence of the Lessor.

Section 18. **Termination**- Notwithstanding anything to the contrary herein contained, it is further agreed that either party may terminate this lease at any time upon giving the other party thirty (30) days written notice of such termination; rent shall be paid by Lessee to date of termination fixed by said notice; and if rent has been paid in advance the proportionate amount for the unexpired term shall be returned to the Lessee.

Section 19. **Default**-It is further agreed that the breach of any covenants, stipulations or conditions herein contained to be kept and performed by the Lessee shall, at the option of the Lessor, forthwith work a termination of this lease and all rights of the Lessee hereunder; that no notice of such termination or declaration of forfeiture shall be required and the Lessor may at once re-enter upon the leased premises and repossess itself thereof and remove all persons therefrom or may resort to an action of forcible entry and detainer, or any other action to recover the same. A waiver by the Lessor of the breach by the Lessee of any covenant or condition of this lease shall not impair the right of the Lessor to avail itself of any subsequent breach thereof.

Section 20. **Notice**-Any notice given by Lessor, to Lessee shall be deemed to be properly served if the same shall be delivered to Lessee, or one of Lessee's agents, or if posted on the premises, or if mailed postpaid, addressed to the Lessee at Lessee's last known address.

Section 21. **Vacation of Premises**- The Lessee covenants and agrees to vacate and surrender the quiet and peacable possession of the leased premises upon the termination of this lease, howsoever. Within thirty (30) days after such termination the Lessee, subject to the provisions of Section 4 hereof, shall (a) remove from the premises at the expense of the Lessee all improvements, structures and other property, not belonging to the Lessor, and (b) restore the surface of the ground to as good condition as the same was in before such structures were erected, including among other things the removal of foundations of such structures, the filling in of all excavations and pits, and the removal of all debris and rubbish, all at the Lessee's expense; failing in which the Lessor may perform the work and the Lessee shall reimburse the Lessor for the cost thereof within thirty (30) days after bill rendered.

In case of Lessee's failure to remove said improvements, structures and other property as provided for in this Section 21, the same shall upon the expiration of said thirty (30) days after the termination of this lease become and thereafter remain the property of the Lessor, and if after the expiration of such thirty-day period the Lessor elects to and does remove or cause to be removed said improvements, structures and other property from the leased premises and the market value thereof on removal or of the material therefrom does not equal the cost of such removal, plus the cost of restoring the surface of the ground as aforesaid, then the Lessee shall reimburse the Lessor for the deficit within thirty (30) days after bill rendered.

Whenever for any reason this agreement shall be terminated, the Lessee shall have thirty (30) days after such termination to vacate the Leased Premises and to remove all property owned or in the possession or custody of the Lessee as provided in Section 4 hereof. Provided, however, that the Lessee shall continue to pay the rental heretofore specified, and all liability provisions shall remain in effect until such time as the Lessee actually vacates the Leased Premises and removes therefrom all of the Lessee's property including all property belonging to third persons within the custody or possession of the Lessee.

Section 22. **Assignment and Subletting**- The Lessee agrees not to sublet said premises or any part thereof, or assign this lease or any interest therein, except by and with the written consent of the Lessor.

Section 23. Successors – Subject to the provisions of Section 22 hereof, this lease shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

Section 24. Eminent Domain – If the whole or any part of the premises hereby leased or adjacent property or facilities of the Lessor shall be taken under the power of eminent domain, then Lessor shall have the right to terminate this lease as of the day possession of either shall be taken and Lessee agrees to hold harmless the Lessor, from and against any and all liability, loss, damage, claims, demands, action, causes of action, costs and expenses of whatsoever nature growing out of or incident to the termination of this lease.

Section 25. Acceptance of rental payment by the Lessor from the Lessee after any default by the Lessee or after termination or expiration of the agreement, or after the serving of any notice, or after the commencement of any suit, or after final judgment for possession of said property, shall not waive such default or reinstate, continue or extend the terms of the agreement or affect any such notice or suit, as the case may be.

Section 26. Other Provisions – **This lease supersedes and cancels Lease No. 14202 dated November 23, 1955.**

IN WITNESS WHEREOF, the parties have executed this lease in duplicate the day and year first above written.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY:

Lessor.

By (Signed) W. J. Holtman

Executive Vice President and General Manager

WITNESS:

(Signed) Louise E. Gray

Lessee

Louise E. Gray

Secretary

APPENDIX 3

**LEASE BETWEEN D&RGW AND
DALE E. PIZEL AND ANNE MARIE PIZEL,
MARCH 9, 1993
(EXTRACTS)**

711943

Approved as to Form
By General Counsel
September 19, 1989
By DRGW Law Department
December 20, 1989

COMMERCIAL LEASE

M.P. 320.75

THIS LEASE is made and entered into this 9th day of March, 1993, by and between **THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY**, a Delaware corporation, (herein "Lessor"), and **DALE E. PIZEL AND ANNE MARIE PIZEL**, individuals, (herein "Lessee").

PART I
BASIC LEASE TERMS

A. **PREMISES**

The term "Premises" shall refer to the land and any improvements and facilities located thereon, at or near Creede, County of Mineral, State of Colorado, as shown on Drawing No. C-934, March 5, 1993, attached hereto as Exhibit "A" and made a part hereof.

B. **EFFECTIVE DATE**

This Lease shall take effect on October 1, 1992, ("Effective Date").

C. **TERM**

This Lease shall be for a term of thirty (30) days ("Lease Term") from Effective Date hereof and shall continue on a month-to-month tenancy basis until terminated hereunder.

D. **TERMINATION**

This Lease shall be terminable by either party at any time without cause on thirty (30) days' advance written notice to the other.

E. **USE**

The Premises shall be used by Lessee solely and exclusively for Lessee's building and office.

F. **RENT**

Commencing as of the Effective Date hereof, Lessee shall pay to Lessor as rent for the Premises ("Base Rent") the sum of TWO HUNDRED FIFTY AND NO/100 DOLLARS ($250.00) per annum, payable annually in advance, with the first year's rent to be paid on or before the execution hereof.

G. **BASIS OF RENT ADJUSTMENT**

Base Rent shall be adjusted based on the higher of the CPI Factor (defined in Section 5 of the General Lease Terms) as indicated on the Consumer Price Index, Urban Wage Earners and Clerical Workers, U. S. City Average, All Items (1982-84 = 100), ("Index"), published by the United States Department of Labor, Bureau of Labor Statistics, or any successor or substitute index published as a replacement for the Index by any United States governmental agency; or the fair rental value of the Premises at the time of said revision.

H. **SECURITY DEPOSIT**

Pursuant to the terms of Section 6 of the General Lease Terms, Lessee shall pay to Lessor upon execution of this Lease a security deposit of ZERO DOLLARS ($ 0.00).

I. **PROOF OF INSURANCE**

On or before the execution of this Lease, Lessee shall furnish to Lessor proof of insurance as required under Section 14 of the General Lease Terms, and the effective date of insurance coverage shall be no later than the Effective Date of this Lease.

J. **ADDRESSES FOR NOTICES**

All notices to either Lessor or Lessee shall be addressed as follows:

To Lessor:
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
Denver Regional Office - Real Estate
P. O. Box 5482
Denver, Colorado 80217

To Lessee:
DALE E. PIZEL
P. O. BOX 400
CREEDE, CO 81130

K. **PAYMENTS TO LESSOR**

Checks shall be made payable to Lessor and shall be mailed to Dept. 320, Denver, CO 80291-0320.

L. **SUPERSEDES**

This lease supersedes and cancels Lease No. 17045 dated May 26, 1978.

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The foregoing Basic Lease Terms and the General Lease Terms set forth in attached Part II are incorporated into and made parts of this Lease.

IN WITNESS WHEREOF, the parties hereto have executed, or have caused to be executed, this Lease in duplicate the day and year first above written.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

By: _____

Title: Regional Director - Real Estate

DALE E. PIZEL

By _____

ANNE MARIE PIZEL

By _____

STATE OF COLORADO)
)ss
COUNTY OF MINERAL)

The foregoing instrument was acknowledged before me this 3 day of May, 1993, by Dale E. Pizel and Anne Marie Pizel.

Witness my hand and official seal.

My commission expires: 2-6-97.

_____
Notary Public
Box 2
Creede, Colo. 81130

EXHIBIT B

GENERAL INSURANCE REQUIREMENTS ("GIR")

Company shall be furnished evidence of insurance in connection with the foregoing Agreement. Such insurance shall be written by an insurance company having a Best's rating of B + 13 or better and licensed to do business in the state where the Premises are located, meeting the requirements stated below in form satisfactory to Company, for each of the following types of insurance in amounts not less than the amounts herein specified.

The terms "Agreement" as herein used shall refer to the Lease, License, or Permit, including supplemental agreements thereto, to which this Exhibit B is attached and made a part of; "Company" shall refer to the Lessor, Licensor, or Permittor named in the Agreement; "Lessee," "Licensee," or "Permittee" shall refer to the Lessee, Licensor, or Permittee, (whichever is applicable), named in the Agreement; and "Premises" shall refer to the property described in the Agreement and as shown on the attached print.

Liability Insurance Requirements

1. COMPREHENSIVE GENERAL LIABILITY INSURANCE OR COMMERCIAL GENERAL LIABILITY INSURANCE ON AN OCCURRENCE BASIS shall have a combined single limit of not less than ~~$2,000,000~~ $1,000,000 per occurrence and shall provide for the following: DFA 04-30-93 5/7/93

   a) Such insurance is primary, without right of contribution from other insurance which may be in effect.

   b) Such insurance shall not be invalidated by the acts or omissions of other insureds.

   c) Such insurance shall not be materially modifiable or cancelable without thirty (30) days' prior written notice to Company (except in the case of cancellation for nonpayment of premium in which case cancellation shall not take effect until at least ten (10) days' notice has been given to Company). This provision is referred to below as "Notice of Modification or Cancellation."

   d) Company shall be named as additional insured.

   e) Contractual liability with deletion of the exclusion for operations within fifty (50) feet of railroad track and deletion of the exclusion of explosion, collapse, or underground hazard, if applicable. (NOTE: For any license or permit involving property within fifty (50) feet of track, the exclusion for operations within fifty (50) feet of track will apply unless eliminated by endorsement).

   f) Premises, products/completed operations, and personal injury coverage.

   g) Severability-of-interest clause.

h) In the case of commercial general liability insurance, the policy must also provide for aggregate coverage at each location and for reinstatement of the aggregate in the event the limits of the policy are exhausted.

i) If the proposed use of the Premises involves a hazard which poses particular risk to the environment, the policy must cover sudden and accidental pollution on a named-peril basis to address the hazard.

2. COMPREHENSIVE AUTOMOBILE LIABILITY INSURANCE shall have a combined single limit of not less than $2,000,000 per occurrence and shall provide for the following:

a) Such insurance is primary, without right of contribution from other insurance which may be in effect.

b) Such insurance shall not be invalidated by the acts or omissions of other insureds.

c) Notice of Modification or Cancellation.

d) Severability-of-interest clause.

3. WORKERS' COMPENSATION INSURANCE shall have limits not less than those required by statute, shall cover all persons employed by Lessee, Licensee, or Permittee, as the case may be, in the conduct of its operations on the Premises and shall provide for the following:

a) Waiver of subrogation against Company.

b) Notice of Modification or Cancellation

c) All states endorsements.

d) Coverage for Longshore and Harbor Workers Act, if applicable.

4. EMPLOYERS' LIABILITY INSURANCE shall have a limit of not less than $1,000,000 and shall be endorsed to provide for (a) Notice of Modification or Cancellation and (b) waiver of subrogation against Company.

5. UMBRELLA OR EXCESS LIABILITY INSURANCE shall provide that if the underlying aggregate is exhausted, the excess coverage shall drop down as primary insurance, and shall provide for Notice of Modification or Cancellation.

A properly completed certificate of insurance shall be furnished to Company for approval.